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Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

WILMA CLARK ,

Petitioner,

vs.

NEW YORK CITY TRANSIT AUTHORITY,
SUBWAY-SURFACE SUPERVISORS ASSOC.

Respondents.

On Petition For A Writ Of Certiorari
To New York Supreme Court, Appellate
Division, First Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. WHETHER court order dated June 27, 2004 violates the due process provision of the XIV amendment, to constitutional rights, and statutes of authorities?

2. WHETHER the courts order on res judicata contravene the Supremacy Clause Article VI [2], for procedural statutes or constitutional provisions when no proof was presented by the respondents that the present matter was previously before the court, following the Respondents' actions January 4, 2005 and or was litigated, as the Petitioner has also refuted both the claims of res judicata and referencing of her action at law as their Article 78 as there are also matters within the right to sue notice from EEOC. The laws have forbade Constitutional deprivations, acts ultra vires discrimination and retaliation, as said by the Petitioner, also to continued deprivation of legal rights), falsehoods, withheld health benefits in the Petitioner's initiated suit before the court May 1, 2006?

3. WHETHER the laws pursuant to the Constitution and statutes there under enacted to the Fourteenth Amendments and First Amendment for the Petitioner's rights, privileges or immunity and to other laws she has vehemently said to have been violated of January 4, 2005, to abridge her rights, would be violation of due process, — (not to have been undermined by cross motions to dismiss the Petitioner's statutory constitutional issues of

deprivation, and legislated discrimination laws applicable in the petitioner's action. Wherein the courts' orders based verbatim to that of the Respondents' stated conjectures, to res judicata, and pension, was instantly issued from the preliminary. The Respondents have made conflicting statements over discretions of the NYCTA to manipulate a Legislated protected pension, and in furtherance of farces the Respondent (NYCTA) has denied retirees' coordinating health benefits. As have the respondent (SSSA), also contravened the retiree health benefits violating the First and Fourteenth Amendments. Pursuant to laws the respondents altered/ interfered with existing rights abridging rights to the hearing and on misrepresentation (fraud) to force her retired, violating the prohibits of the Constitution, pursuant to laws thereof and legislated laws.) — although the court in acceptance to the Respondents' conditioning a proceeding, for privilege of res judicata, to be excused from legislated laws, and laws for the United States Constitution and the Amendments, nevertheless violated the Petitioner's rights to due process of the laws?

4. WHETHER the Court has discretion in denying Constitutional protected rights to laws to deprive the Petitioner of rights to claims with discriminations and proof of torts, withheld health insurance benefit and pursuant to right to sue in court and the order court made on dismissal upon the notice of cross-motions by the respondents for res judicata without proof of fact and is contravening laws having knowledge of deprivations of the XIV Amendment and asserted violations of the

Constitution and State Constitution, and the laws thereof for the action as herein?

LIST OF PARTIES

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OPINION BELOW

The opinion of the highest state court to give review is unpublished. The order and opinion of the Appellate Division, First Department is reprinted in the appendix to this petition and appears at pages App. 1-App. 2 and affirmed the lower court's order granting respondents' motions to dismiss.

The order and decision of the New York State Supreme Court is unpublished. The reprinted order and decision appears at pages App. 3-App. 4.

State Supreme Court in sequence for decision and order is reprinted unpublished at App. 5-App. 6.

The order and decision of the Court of Appeals to a motion by Petitioner for leave to appeal appears reprinted at App. 7 and is unpublished.

JURISDICTION

This case involves the review of a judgment on December 18, 2007, which the Appellate State Court entered the decision and order of that court and it was timely petitioned for rehearing by leave to appeal to the Court of Appeals. The Appeal Court issued an order denying rehearing the appeal on March 25, 2008.

The jurisdiction of this Court to review by writ of certiorari is provided under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV sec. 2 [1]. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States.

Article VI [2]. This Constitution, and Laws of the United States which shall be made in pursuance thereof; . . , shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the constitution of any State or laws of any State to the contrary notwithstanding.

Amendment I. Congress shall make no law abridging the freedom of speech, or the right to petition the Government for a redress of grievances.

Amendment V. No person shall be deprived of life, liberty, or property, without due process of law.

Amendment XIV Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Sec. 5.

42 U.S.C. § 1983 Every person who, under color of statute, ...custom, or usage, of any State .., subjects, ...any citizen of the U.S. .. to the deprivation of any rights, privileges, immunities secured by the Constitution and the laws, shall be liable to the

party injured in an action at law, . . . or proper proceeding for redress.

Executive Law, Article 15, § 290, et seq., under the heading of the Human Rights Law. The Legislature therein found and declared that the State "has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that failure to provide such equal opportunity, whether because of discrimination, prejudice ...not only threatens the rights and proper privileges but menaces the institution and foundation of a free democratic state." (290, subd.3), and equal opportunity for employment is basic to that enjoyment. Section 296 thereof provides, in pertinent part, that "1. It shall be an unlawful discriminatory practice: (a) For an employer . . ., because of the race, color, sex . . . of any individual, to refuse to employ or . . . to bar or to discharge . . . from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Title VII

STATEMENT OF THE CASE

In a state court decision where by the highest court has settled upon an order disregarding Federal questions where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or statutes of valid authority exercised under the United States, the New York Courts have

decided the important question of federal law in a way that conflicts with this Court and has departed from the accepted and usual course of judicial proceeding for a case the Petitioner filed May 1, 2006 with letters of right to sue. And "for a State court or Federal Court to issue an order contrary to a valid federal defense would be a violation of federal law. Where federal law is applicable, its application is mandatory in all courts state or federal." Testa v. Katt, 330 U.S. 386. The order made June 27, 2006 having been res judicata was entered July 10, 2006, and affirmed December 18, 2007 on decision by the Appellate Division. There from the Petitioner made appeal to the Appeal Court and was denied on an order issued March 25, 2008.

The complaint being for discrimination, retaliations, actual misrepresentation made in threat, for deprivations of property interest rights guaranteed, falsehoods and for retiree health benefits discovered September, 2005 withheld and owed there too under the Fourteenth Amendment of the Constitution and other amendments incorporated therein. The complaint under the color of laws ... or usage and amendments of the United States Constitution and laws, and laws thereof for civil rights of State legislation were before the New York State Supreme Court, also for the wrongful termination and forced retirement to accusations that never arose to dismissal of the Petitioner. The Respondents upon service of the complaint immediately took the liberty to file the RJI (ready for judicial intervention) notice so the complaint would be assigned to their regular assigned judge for the New York City Transit's cases, basically noticed for tort claims. The first

conflict, which the court below expressly gave recognition for was the Respondents' answering by cross-motion to dismiss, and fashioned the Petitioner's complaint to be an Article 78. Their pretense of an Article 78, special proceeding, was to expedite preclusion of the action, based on limitation, if not on false claims for res judicata, or contract. The Respondents commenced ambiguous arguments at time of the preliminary hearing June 22, 2006 on all their issues first claiming Article 78 proceeding under civil service law were no longer permissible since a new arbitration provision in the contract, however posing the Petitioner's complaint as a special proceeding she adamantly disputed, also contradictable by documents and laws. They carried forth this for statute of limitation, as also to their duty of fair representation, not of her complaint. There following upon to falsely informing the court of arbitrations with untruthful defaults by petitioner, also disputable from evidence. Then swaying the court in more falsities made on their forced retirement for wrongful termination they had conditioned on the Petitioner's pension, and also claimed was a necessity as they made contradictory statements nevertheless to authority of the pension, admitting to their failure to provide the required civil service predeprivation hearing. The court became absorbed in a pension ignoring the Petitioner's claims for right to sue letter, and the respondents doing a lot of violations causing damages. Wherein the court in the preliminary conference on transcript June 22, 2006 immediately made order to dismiss based solely on the Respondents' false allegations, with no evidence given of res judicata the court granted the

respondents dismissal, as already been litigated. There was made more deprivation of the Petitioner's fundamental constitutional rights.

False allegations of res judicata

The Respondents premised their motion to dismiss the Petitioner's complaint, for deprivations and discrimination May 1, 2006 on an Order to Show Cause Staying hearing/ arbitration, petitioned by an Article 78, served October 28, 2004, at which time the Petitioner was suspended and made application as pro se, to prior Court in Kings County to review the new binding and final hearing procedure being in conflict with the hearings authorized by the New York Civil Service Laws for disciplinary proceedings in a Section 75 proceeding requiring a formal due process hearing be held before any disciplinary penalty may be imposed upon a permanent competitive class civil service employee as for continuance in employment per the New York Public Authority Laws 1210, the State legislation having granted NYC Transit, civil service employees property interest to Section 76 (1) for an Article 78 proceeding. The respondents' perceptions, in their cross motion on October 28, 2004, to dismiss the Article 78, was duty of fair representation no court has jurisdiction to such claim, arbitration is binding and final, no cause of action, and stated, arbitration is a mute issue, were not on the merits of the Petitioner's claims in the prior court. The Respondents retaliated to First Amendment protection under the Fourteenth falsely asserting the Petitioner had failed to appear for hearings wherein proof disputing accusation failure and knew under the

Memorandum's provision may be a grievance issue. The Kings County court granted order on the Respondent, NYCTA's, cross motion to dismiss Stay, and Article 78, November 24, 2004 without resolving the issue in question.

The respondents noticed arbitration January 4, 2005, however in the name respondent employer decision made with respondent union intended actions that were discovered for abrogation of the arbitration hearing, and also other than adhered to provision in the Memorandum, for the collective bargaining 'being without any power or authority to add to, delete from, or modify, and had no authority to render any opinion or make any recommendations inconsistent with, and contrary to provision of the Civil Service Laws and regulations,' were in fact their concerted actions asserted in furtherance for retaliation and unlawful discrimination motivates threatening to diminish the Petitioner's pension if she did not retire, and further stipulating no reinstatement arising from the respondents action. The Respondents stipulated to deter access to the Court. She subsequently discovered her pension was protected from their control, and having no intention of complying upon discovering the respondents were without authority to diminish her pension; in their unlawful action for deprivation of her constitutional protected rights and was for discrimination The Petitioner received letter January 21, 2005 imposing dismissal for failure to submit an application within the specified time the Respondents dictated she apply and provide proof of retiring. Petitioner informed the Respondents subsequent to the letter for termination that their procedure being in conflict

with the hearings authorized by the New York Civil Service Laws, and pursuant to Legislation grant for Transit civil servants for disciplinary proceedings requiring a formal due process hearing be held before any disciplinary penalty, also informing a pension is not for bargaining pursuant to a civil service law. And in seeking corrective measures for wrongful termination there were more retaliation. The Petitioner having asserted the respondents' latter conduct as cause of action was not res judicata .

> The Court have applied a general principal, if the government could deny a benefit to a person because of his constitutionally protected speech... , his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible. Perry v. Sindermann, 408 U.S. 593 at 597.

However the State Supreme Court

The court on June 22, 2006 had the Respondents begin the preliminary conference to which they made false allegations, as above pages 4 and 5. Then leading the court to believe they were within rights to make a fictitious arbitration to force retirement and withholding the predeprivation hearing for the Petitioner's pension. Their actions were in concert and they expressed control and contradiction of no control of the pension before the court while union respondent advised the court to dismiss on duty of fair representation for statute of limitation, the court

poised on Article 78, as same limitation then returning focus to pension before question the petitioner. The Petitioner therein made the court aware there were lies, they forced a retirement, violated Civil Service Law section 75 and the Public Authority Laws having no right, nor authority in the actions taken and a right of sue letter on the matter of discrimination, retaliation, rights as a civil service employee, as also existing other continuing damages and owed pension health benefits. The court ending case on the transcript record, "they have nothing about discrimination," "this is over." "You have your pension."[1] The court at all times ignoring Petitioner's claims of which she clearly presented to the court and the respondents in her answering papers before June 22, conference. "The Fourteenth Amendment forbade any State from depriving any person of life, liberty or property without due process of law," Taylor v. Beckham, 178 U.S. at 599-601.

> "The prohibitions of that amendment, as we have often said, apply to all the instrumentalities of the State, to legislative, executive, and judicial authorities; and therefore it has become a settled doctrine in the constitutional jurisprudence of this country that whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition." And at 605,– "The essential principle is that the State

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[1] Sept., 2006 the court subsequently printed decision App. 5 in disregards and retracting from facts for other than good reasons.

> shall not by any of its agencies destroy or impair any right appertaining to life, liberty or property in violation of the principles upon which the requirement of due process of law rests."

The order made June 27, res judicata was entered July 10, 2006 and reprinted to the App. 3-App. 4.

The Petitioner on August 24, 2006 appeared again before the New York Supreme Court on a motion filed July 5, 2006 for opportunity to be heard for vacating the order and for a removal of the case from before Transit's venue.[2] The court would not give the removal, and barred arguments on discrimination, Constitution violations, first amendment, and evaded fourteenth amendment issues, the Supremacy Clause, and August 24, focused on pension again. The transcript record of the court closing on application for, Respondents' request, 'for any motions, any order to show cause by Petitioner be reviewed by the judge,' and the court further spoke on the record, "(Petitioner), cannot maintain another action against Transit or the union in Manhattan County." Which the court in sequence to the order July 10, expressed September 11, 2006, "(Petitioner) brings Article 78, claiming discrimination," also inappropriate to the due process, equal

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[2] The Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances. 5th Amend. The Court imposed "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of cause." Logan v. Zimmerman Brush Co. 455 U.S. 422, 429, in Societe Internationale v. Rogers, 357 U.S. 197, Id., 209.

protection clause, the Supremacy Clause, and was far from factual other than to discrimination claim, the court was denying in lieu of pension. The action was not an Article 78, and vehemently disputed by Todaro v. Norat, 112 F.3d 598, (1997, 2d cir.) and Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) as both the court and respondents had been presented objection papers answering their cross motions. The court further expressly assumed no deprivations and in its decision written thereafter stated, "defendant had worked out a procedure for plaintiff. If she left her job, she could recover her pension and medical benefits ... All she would have to do is go from one office to another. ...There is no basis for this proceeding." The court having explicitly recognized the respondents' concerns to dismissing the case, without a shred of evidence, stated, "defendants based their claim on the fact that plaintiff started an earlier proceeding in New York County," (1999) and with no cognizant to facts, nor claims or issues the court readily determined (Brooklyn) Kings County dismissed the same case, and it would align based upon Respondents' claims, whose intentions had been for misleading to sustain dismissal. The court therefore premised, "instant case is also dismissed as there is no basis for this proceeding." Decision entered September 27, 2006 and reprinted to the App. 5-App. 6.

The Appellate Decision

The Appellate affirmed the Supreme Court, order res judicata July 10, 2006, while expressing wrongful decision for abrogation in an employment

"position" under state laws pursuant to the due process clause, and retiree health "benefits" protected by the Fourteenth Amendment which were still intact January 4, 2005. The respondents' procedures were not protected rights within the laws for due process of civil service property interest inquired of October 28, 2004 for arguable statutory procedural safeguard and the Appellate in statement of decision assumes losses that had not occurred of a position, nor to the health benefits. The Respondents had actually dismissed property interest questioned October 28, 2004, for the intention of not providing the safeguard in lieu as of the new memorandum, having no transcript, an internal tripartite panel hearing with arbitrator as a part of the panel for final and binding, and at variance with the statutory provision in the Public Authority Law 1210(2) and Civil Service Laws, for the appointment promotion and continuance of employment of all employees of the Authority shall be govern by the provisions of the civil service laws. Section 75 is a due process for formal trail procedure unless formally waived, by the grievant. It allows a Section 76(1) appeal on determination for penalty to the New York Supreme Court in accordance with the provisions of Article 78. And only in absent of the State legislation in the Public Authority statute or constitutional provision is power conferred to do otherwise; Civil Service Forum v. New York City Transit Authority, 151 N.Y.S.2d 402 (1956) at 406 [5,6]. Respondents acquired order dismissing the question of property interest under their intentional false perceptions November 24, 2004, and subsequently continuing retaliations on January 4, 2005.

The court having read the transcript and motions by Respondents for their purpose January 4, 2005 and acted upon stipulation giving expression, meaning of threat controlling the pension, and Respondents were without protection of the first amendment having violated the Petitioner's rights by such actions and representing no access to the court, and no reinstatement; the court was aware the respondents had violated a required predeprivation, First, and Fourteenth Amendment in the wrongful termination and although ignored inappropriately by order for respondents' res judicata, the court was aware new cause of action stated, was applicable, and the proceeding was not due process nor in equal protection of the laws at the lower court. And what decision is effective without all the evidence not then before the court for consideration? First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" (NAACP v. Button, 371 U.S. 415, 444) which the legislature has the power to control. The Appellate is aware to destroy at will virtually any state created property interest, ... "the legislature may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. . . . [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Vitek v. Jones, 445 U.S., at 490-491, n.6, quoting, Arnett v. Kennedy, 416 U.S., at 167. —Also,

> There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation ..... for malum in se, is void and gives no right of action.

> The doctrine, .., is not peculiar to contracts of corporations. It has its roots in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statue, and in the application of this principle it is immaterial that the contract except for the prohibition would be lawful. [N]o one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed. Bath Gas Light Co. v. Claffy, 151 N.Y. at 30.

The Appellate determined by presuming, "any claim ... for breach" from the Respondent's union whom claimed, "duty of fair representation," is barred by statute of limitations, and in prior court the Respondents' cross motion emphatically had claimed, no court has jurisdiction to such claim, when neither was that an issue in prior court, nor the Petitioner's claims May 1, 2006.

> Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority This Court have repeatedly emphasized, 'the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages, Felder v. Casey 487 U.S. 131, 139; Bunrnett v. Grattan 468 U.S 42, 55. And: What the Fourteenth Amendment does require however, "is 'an opportunity .. . granted at a meaningful time and in a

meaningful manner,' Armstrong v. Manzo, 380 U.S. 545, 552 (1965), 'for [a] hearing appropriate to the nature of the case,' Mullane v Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)." Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

The respondent union a party to misrepresentations and erroneous charges neither arising to termination, deprivation of hearing for wrongful termination, presenting pension in threat of reducing the value, fictitious failure to exhaust, obstructing judicial process for misleading the court, aiding discrimination and retaliations.

The Court have held that the private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth amendment equal protection rights" and action "'under color' of law for purposes of the statute." Adickes v. S. H. Kress & Co., 398 U.S. 144, 152 (1970). And in Johnson v. Duffy 588 F.2d 740, 743 the Court states, personal participation is not the only predicate for Section 1983 liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. (Cf. Beverly v. Morris (5th Cir. 1972) 470 F.2d 1356.)

Res Judicata is incorrect

Under N.Y. or Federal law a "plaintiff's failure to supplement pleadings of his or her already commenced lawsuit will not result in res judicata bar when plaintiff alleges defendant's later conduct as cause of action in second suit." The earlier decision may be a conclusive adjudication of petitioner's rights, existing then; it cannot be an adjudication of rights thereafter conferred by law, or bar a new proceeding to vindicate new rights. Maharaj v. Bankamerica Corp., 128 F.3d 94 (2nd Cir. 1997). New York law is the same See Cohen v. Board of Educ. of East Ramapo Cent. School Dist., 84 A.D.2d 536, 537, 443 N.Y.S.2d 170 (2d Dep't 1981) (res judicata will not bar lawsuit "based upon events which occurred subsequent to the commencement of the prior proceeding").

[T]he United States Supreme Court said that a judgment, "it cannot be given the effect of extinguishing claims which did not even then exist and which could not have been sued upon in the previous case." Lawlor v. Nation Screen Service, 349 U.S. 322, Id. at 328.

The Decisions Are Incorrect

The court's decision is further made upon conjectural perception entertained on allegation, "failure to exhaust," by respondents having anticipated to accomplish such actions by their authority in decision not to have predeprivation hearing as also (neither used the procedures in civil

service law, Section 75, applicable for Article 78 proceeding provided by law the State legislation enacted for property interest to civil service employment in the New York City Transit, within the permanent competitive class, nor the memorandum's ambiguously stated, "procedure and rights set forth herein shall be in lieu of any other disciplinary procedure and rights that may have previously applied to an employee covered by this agreement including but not limited to the procedures and rights specified in Sections 75 and 76 of the Civil Service Law and shall apply to all persons who but for this procedure and rights would be subject to Sections 75 and 76." Ambiguous provision the petitioner believes translate, including but not confined to the procedures and rights specified in Sections 75 and 76. Then ending the provision, "arbitration awards shall be final and binding"). There was obligation and they impaired for intended deprivation to property interest. The property interest a subject to which required due process of law was being denied in violation of the Fourteenth Amendment. And "failure to exhaust" does not support the court's conclusion, when the State may not avoid its obligation to provide a pretermination hearing by engaging in sham or pretextual conduct. "It is a fundamental rule that in all judicial or quasi judicial proceedings, whereby the citizen may be deprived of his property he shall have notice, and an opportunity of a hearing before the proceedings can become effectual;" In the Matter of Ford (6 Lans., 92), Judge Gilbert; Stuart v. Palmer 74 N.Y. 183, 193. The decision of abrogation of the hearing was the respondents' intention not foreseeable. It is well

settled that: when a government employee is found to have a property interest in continuance of employment the due Process Clause of the Fourteenth Amendment forbids discharge before a pretermination hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532; Patsy v. Bd. of Regents of Florida, 457 U.S. 496.

While the Appellate would improperly be dismissing a complaint on "notice–of–claim" the Court has said,

> "Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." The theory that States retain the authority to prescribe the rules and procedures governing suits does not extend so far as to permit States to place conditions on the vindication of a federal right. "State courts' simply are not free to vindicate the substantive interests underlying a state rule ... at the expense of the federal right;" Felder v. Casey, 487 U.S. 131 - 141, 142, 147 & 152; see Lawless v. City of Buffalo, 578 N.Y.S.2d 27. "Any State law, however, clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Free v. Bland, 369 U.S. 663, 666.

Disclosure has unearth relevant facts, and evidence

The Appellate claim the Petitioner attempt to circumvent procedural hurdles, believes also the allegations of discrimination is unavailing the com-

plaint offer no specifics, is unjustifiable; before deciding to terminate, disclosure (discovery) has unearth relevant facts and evidence. The Court found in St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, a facially valid neutral reason offered by the defendants for their actions were in fact pretextual. The plaintiff having a prima facie case has the ultimate burden of persuasion may, but need not have prevailed on proof. Whether a plaintiff prevails is a jury question. – Reeves v. Sanderson Plumbing Products, 530 U.S. 133; Matter of New York State Off of Mental Health, Rochester Psychiatric Ctr. v. N. Y. State Div. of Human Rights, 709 N.Y.S.2d 755. And if the respondents had argued that the complaint failed to set forth relevant facts to support general allegations of discrimination. The decisive answer to this is that an employment discrimination complaint need not contain specific facts. To the contrary, all the Rule require is "a short and plain statement of the claim," Rule 8 (a) (2). Swierkiewicz v. Sorema N.A., 534 U.S. 506 certiorari 2002. Following the simple guide of Rule 8 (f) that "all pleadings shall be so construed as to do substantial justice," Conley v. Gibson, 355 U.S. 41, 47. And the standards relating to burden of proof in discrimination cases are set forth by federal evidentiary. Sogg v. American airlines, Inc., 603 N.Y.S.2d 21 (1st Dep't 1993).

> Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It

> is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights. J.I. Case Co. v. NLRB, 321 U.S. 332–338-339; Alexander v. Gardner–Denver Co. 415 U.S. 36, 52. Moreover, the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.415 U.S. at 48.

The courts held in Pillow v. Roberts 13 How. 54 U.S. 472, 476, "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed." However the court rendered an order against a person without a hearing, adapted to the nature of the case.

> Stuart v. Palmer 74 N.Y. 183, 190. It is a rule founded on the first principles of natural justice older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprive of these without due process of law has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the Federal or State Constitution. The order and decision was entered December 18, 2007 Appendix 1-2.

REASONS FOR GRANTING THE PETTION

I. REVIEW IS WARRENTED WHEN THE SAME LAW OR COURSE OF PROCEEDING

IS NOT APPLICABLE TO ALL PERSONS SIMILARLY SITUATED

Nothing in the above opinion is at all indicative of an abandonment of rights by the Petitioner of her reliance on the Fourteenth Amendment which was so distinctly stated in the opinion of the Appellate Division. On the contrary, the court's discussion of the case and its citation of authorities proceed as if it were considering the identical claims that were (not) presented in the prior court of Kings County Supreme, and there denied. On authorities, the State Courts have assailed and is in conflict with the clauses of the Amendment XIV, sec. 1 is applicable to all persons similarly situated. The lower court proceeded inappropriate to deny the Petitioner of rights when a government employee is found to have a property interest in continuance of employment, the due Process Clause of the Fourteenth Amendment forbids discharge before a pretermination hearing was known. The right to equal protection of the laws is not denied when it is that the same law or course of procedure that is applicable to any other person under similar circumstances and conditions. "When ever the law operates alike on all persons and property similarly situated, equal protection cannot be said to be denied." Walston v. Nevin, (1888) 128 U.S. (L. ed.) 544, affirming (1887) 86 Ky. 492, 58 W. 546.

II. THE SUPREMACY CLAUSE PROTECTS THE SUBSTANTIVE LAWS.

Federal Civil Rights laws do not recognize local practices such as Article 78 proceedings as foreclosing such Constitution's laws. The Supremacy Clause protects the substantive laws constitutionally provided. However the State Appellate decision uses options to erode federal law and Petitioner's rights constitutionally to be protected and deprives her of important rights guaranteed under the Constitution and the laws thereof. The State Courts improperly dismissed the Petitioner's case and the Certiorari review should be granted upon all the forgoing.

CONCLUSION

For reasons relied on, the Writ of Certiorari for which Federal questions to the right, privilege, and validity of statutes for the Amendments pursuant thereof the Constitution of the United States had been properly raised; the Petitioner pray the Writ be granted.

Respectfully submitted,
Petitioner, Wilma Clark
24-23 Ericsson Street
E. Elmhurst, NY 11369
Phone: (718) 458-3114

Date: August 15, 2008

Mazzarelli, J.P., Saxe, Marlow, Catterson, Malone, JJ.

2215 Wilma Clark, Index 105952/06
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendant-Respondents.

Wilma Clark, appellant pro se.

Martin B. Schnabel, (Baimusa Kamara of counsel), for New York City Transit Authority, respondent.
Stuart Salles, for Subway-Surface Supervisors Association, respondent.

Order, Supreme Court, New York County (Robert D. Lippmann, J.), entered July 10, 2006 which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

To the extent plaintiff seeks reinstatement of position or benefits, such claims could have been pursued in the proceeding in King County, which was dismissed, and thus are precluded by res judicata (see Ryan v New York Tel. Co., 62 NY2d 494, 501-502 [1984]). Furthermore, her failure to exhaust her administrative remedies in view of the disciplinary charges that led to her dismissal precludes review of those claims by this Court (Mat-

ter of Robinson v New York City Tr. Auth., 226 AD2d 467, 468 [1996]).

To the extent plaintiff alleged tort claims, her failure to file the appropriate notice of claim pursuant to General Municipal Law § 50-e and Public Authorities Law § 1212(4) renders these claims nonjusticiable.

Any claim against defendant Association for breach of its obligation of fair representation is barred by the appropriate statute of limitations (CPLR 217[2]).

Finally, any attempt by plaintiff to circumvent any of these procedural hurdles by intimated allegations of discrimination is unavailing. The allegations of the complaint offer no specifics on any discrimination claim, and nothing in the papers submitted in opposition to the motion for dismissal is any more enlightening. In any event, the complaint would properly be dismissed for failure to state a cause of action.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 18, 2007

_____

CLERK

SUPREME COURT OF THE STATE OF NEW YORK– NEW YORK COUNTY

Present: Hon. Robert D. Lippmann, PART 21
Justice

Wilma Clark,

-v-

New York City Transit Authority

index no. 105952/06
motion date_____
motion seq. no. 001
motion cal. no. 22

The following papers, numbered 1 to__ were on this motion to/for_____

	papers numbered
Notice of motion/Order to Show Cause~Affidavits~Exhibits . . .	
Answering Affidavits~Exhibits	
Replying Affidavits	

Cross-Motion: □ Yes ■ No

Upon the foregoing papers, it is ordered that this motion

Motion by Subway-Surface Supervisors Association to dismiss because the issue has already been litigated and dismissed is granted.

There fore based on res judicata this motion is granted.

This constitutes the decision and order of the court.

Dated: June 27, 2006 Hon. Robert D. Lippmann
J.S.C.

Check one:
■Final Disposition □ Non-Final Disposition

Check if appropriate: □ Do Not Post □ Reference

FILED JUL 10, 2006 COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK– NEW YORK COUNTY
Present: Hon. Robert D. Lippmann, PART 21
Justice

Wilma Clark,

-v-

New York City Transit Authority

index no. 105952/06
motion date_____
motion seq. no. 002
motion cal. no. 6

The following papers, numbered 1 to__ were on this motion to/for_____

papers numbered

Notice of motion/Order to Show Cause~Affidavits~Exhibits . . .
Answering Affidavits~Exhibits
Replying Affidavits

Cross-Motion: □ Yes □ No

Upon the foregoing papers, it is ordered that this motion

Transit respondents move to dismiss.

See 001

Dated: June 27, 2006 /s/ Hon. Robert D. Lippmann
J.S.C.

Check one:
■Final Disposition □ Non-Final Disposition

Check if appropriate: □ Do Not Post □ Reference

FILED JUL 11, 2006 COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK– NEW YORK COUNTY
Present: Hon. Robert D. Lippmann, PART 21
Justice

Wilma Clark,

-v-

New York City Transit Authority

index no. 105952/06
motion date_____
motion seq. no. 03
motion cal. no. ___

The following papers, numbered 1 to__ were on this motion to/for_____

	papers numbered
Notice of motion/Order to Show Cause~Affidavits~Exhibits . . .	_____
Answering Affidavits~Exhibits	_____
Replying Affidavits	_____

Cross-Motion: □ Yes □ No

`Upon the foregoing papers, plaintiff Wilma Clark brings an Article 78 Proceeding claiming discrimination. Plaintiff claims additionally that the defendant's misrepresentations were intentional. There is no proof for either allegation. Defendants based their claim on the fact that plaintiff started an earlier proceeding in New York County. These proceedings were dismissed. There is no basis for this. Furthermore, the defendant had worked out a procedure for plaintiff. If she left her job, she could recover her pension and medical benefits. All she would have to do is go from one office to another. Plaintiff refused to go and even though this Court advised her to do the same thing, as yet it has not been done.

Plaintiff's case in Brooklyn and her earlier one in New York County were both dismissed. The instant case is also dismissed as there is no basis for this proceeding.

This constitutes the decision and order of the court.

Dated: 9/11/2006 /s/ Hon. Robert D. Lippmann
Check one: J.S.C.
■Final Disposition □ Non-Final Disposition
Check if appropriate: □ Do Not Post □ Reference
FILED: SEPT 27, 2006 COUNTY CLERK'S OFFICE

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 25th day of March 2008

Present, Hon. Judith S. Kaye, Chief Judge, presiding

1-10 Mo. No. 146
Wilma Clark,

Appellant,

v.

New York City Transit Authority et al.,

respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ Stuart M. Cohen
Clerk of the Court

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(2)

No. 08-315

Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

WILMA CLARK ,

Petitioner,

vs.

NEW YORK CITY TRANSIT AUTHORITY,
SUBWAY-SURFACE SUPERVISORS ASSOC.

Respondents.

On Petition For A Writ Of Certiorari
To New York Supreme Court, Appellate
Division, First Department

REHEARING
PETITION FOR A WRIT OF CERTIORARI

WILMA CLARK
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E. ELMHURST, NY 11369
Phone (718) 458-3114

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REHEARING WRIT OF CERTIORARI

James Madison wrote in The Federalist Papers, "If men were angels, no government would be necessary." If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself.

STATEMENT OF THE CASE

The Petitioner appealed from order entered in the State Supreme Court granting the Respondents their cross-motion to dismiss res judicata at preliminary hearing June 24, 2006, and allowed the Respondents' false claim that the Petitioner filed a proceeding for an Article 78. That which the Petitioner filed was not an Article 78, but a complaint for discrimination, retaliations, depriveation, misrepresentation\ fraud, altering of contract, withholding health benefits, falsehoods and damages she filed within the laws for the United States Constitution and Civil Rights. January 4, 2005 Respondents withheld hearing required for such Civil Service employee as per State legislated laws not withstanding also the new diminished procedures, wherein the Respondents denied property interest. The Respondents did this as they calculated

threat to the petitioner's pension and unknown to her the Respondents authority to diminish her pension, they concurred on their presentation as intended to make misrepresentations for withhold hearing, knowing they had no control, the Petitioner subsequently learned. Their unlawful actions were discriminatory motivated, retaliatory and moved upon to obstruct legal rights and to withhold employment on false accusation of a hearsay phone call and inapplicable to discharge, she was wrongful termination causing damages. An application in prior court on October 28, 2004 went unanswered to question of rights in state legislated property interest being interfered with on new procedure having arbitration hearing being final and binding. And the Respondents told the court, it was without jurisdiction to arbitration, thereat court convened November 24, 2004 and respondents submitted their order to dismiss.

THE CONSTITUTION & ARTICLE VI

The State Court instant order June 27, 2006 and the appeals made to the higher Court improperly dismissed the Petitioner's complaint, res judicata while ignoring Constitution rights that Federal Civil Rights Laws do not recognize local practices as Article 78, proceedings as a foreclosure to such laws pursuant to the Constitution, as also are supported by Article VI, and the Judges in every State shall be bound thereby the Supremacy Clause for the substantive laws constitutionally provided.

DUE PROCESS & SUBSTANTIVE LAWS

On authorities, the State Courts have assailed and is in conflict with the clauses of the Amendment XIV, sec. 1 is applicable to all persons. Where a public employee is found to have a property interest in continued employment, the Fourteenth Amendment's due process clause forbids discharge absent a pre-termination hearing. O'Neill v. City of Auburn, 23 F.3d 685, 688 (2d Cir. 1994); Dwyer v. Regan, 777 F.2d 825, 831 (2d Cir.1985). Todaro v. Norat, 112 F.3d 598, 1997 WL 219423, *1 (2d Cir.1997); "[t]his circuit looks to New York Civil Service Law and the Statutes which create a particular position . . . to determine whether a New York public employee has a property interest . . . requiring that he be afforded a hearing before termination." "Minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action; Vitek V. Jones, 445 U.S. 480, 491 (1980). . . . Because the entitlement arose from a state statute, the legislature had the prerogative to define the procedures to be followed to protect that entitlement.; Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982). The Court elaborated in Loudermill:

"The point is straightforward: The Due Process provides that certain substantive rights—life, liberty and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would

be reduced to a mere tautology." And the Appellate in decision, December 18, 2007, poses a post Article 78, as remedy for the failure to accord the Petitioner property rights in her position is rejected as advised by the Supreme Court in Loudermill, 105 S.Ct. at 1492-93; Logan v. Zimmerman Brush Co., 455 U.S. 422, 432, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265; and Vitek v. Jones, 445 U.S. 480, 491, 100 S.Ct. 1254, 1262, 63 L.Ed.2d 552

THE REHEARING SHOULD BE GRANTED

It is well settled that New York courts do not bar an action seeking damages for a violation of civil rights based on a prior action brought pursuant Article 78. See also Antonen v. Ward, 943 F.2d 198 (2d Cir. 1991); and neither arbitration,— Farooq v. NYS Office of Mental Health, 744 N.Y.S.2d 837, 838 (Sup. 2002), 192 Misc.2d 30,— citing the court in McDonald v. City of West Branch, Mich., 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984)— under a collective bargain there is no preclusive effect, even if the arbitration had been the subject of a state court proceeding. Fayer v. Town of Middlebury, 258 F.3d 117 (2d Cir. 2001). Petitioner's Constitutional guaranteed rights have been denied where substantive property was taken without adequate procedures. Section 1983 provides for deprivation of any rights, privileges, or immunities secured by the Constitution and laws. The State Courts failed to comply with the authorities, enabling it to control the governed.

CONCLUSION

The Constitution for the United Stated and the laws thereof did so enabled the government to control the governed and provided for certain substantive rights supported by the Supremacy Clause which cannot be deprived. Where upon controlling authorities, objective to decisions in the State Courts, denying due process for Petitioner's substantial rights, a rehearing for a writ of certiorari under the circumstance should be granted.

Respectfully submitted,
Petitioner, Wilma Clark
24-23 Ericsson Street
E. Elmhurst, NY 11369
Phone: (718) 458-3114

Date: December 3, 2008

CERTIFICATION

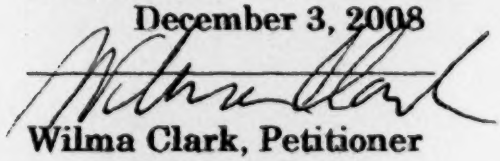
On Petition For A Writ Of Certiorari
To New York Supreme Court, Appellate
Division, First Department

REHEARING
PETITION FOR A WRIT OF CERTIORARI

The Petitioner Wilma Clark, self represented herein certifies that the petition is restricted to the grounds specified in Rule 44 paragraph 2, and that it is presented in good faith and not for delay.

Pursuant to 28 U.S.C. § 1746(1), I declare under the penalty of perjury under, the laws of the United States of America that the foregoing is true and correct.

Date: New York, New York
December 3, 2008



Wilma Clark, Petitioner
24-23 Ericsson Street
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